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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

SEAN COOK,)	
)	No. 41449
Petitioner-Respondent,)	
vs.)	Kootenai Co. Case No.
)	CV-2011-10315
STATE OF IDAHO,)	
)	
Respondent-Appellant.)	
)	
)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

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District Judge

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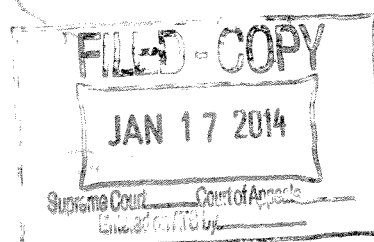


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STATEMENT OF THE CASE

Nature of the Case

The state appeals from the district court's order granting post-conviction relief.

Statement of the Facts and Course of the Proceedings

Sean M. Cook filed a petition for post-conviction relief challenging his conviction for rape. (R., pp. 7-15.) He asserted claims of ineffective assistance of counsel and prosecutorial misconduct. (R., pp. 14-15.) The district court summarily dismissed some of his claims, and the matter proceeded to an evidentiary hearing on whether Cook's criminal trial counsel was ineffective for failing to prevent admission of evidence that Cook had threatened a witness and failing to object to evidence of the victim's out-of-court statements. (R., pp. 265-284; see generally Tr.) The district court ultimately concluded that trial counsel had been ineffective for both alleged failures and granted a new trial in the criminal case. (R., pp. 392-405.) The state filed a timely notice of appeal. (R., pp. 422-24.)

ISSUES

1. In concluding that trial counsel was ineffective for failing to object to evidence that Cook threatened a witness, the district court failed to even address counsel's stated reason for not objecting. Does application of the law to the facts of this case show that the district court erred in concluding that counsel provided ineffective assistance of counsel when he made the strategic decision to not object to the evidence of threats?
2. The district court concluded that counsel was ineffective for failing to object to evidence of the victim's initial disclosure. The record shows that counsel used that evidence to argue that the victim's delay in disclosing indicated she had fabricated her claim she was raped. Does application of the law to the facts of this case show that the district court erred in concluding that counsel provided ineffective assistance of counsel when he made the strategic decision to not object to testimony regarding the victim's disclosure of the rape?

ARGUMENT

I.

The District Court Applied An Incorrect Legal Analysis And Reached An Erroneous Conclusion Regarding Counsel's Tactical Decision To Not Object To Evidence Of The Witness's Explanation For His Prior Inconsistent Testimony

A. Introduction

Paul Nelson, Cook's jailhouse cell partner, testified at the preliminary hearing. (P.H. Tr., p. 90, Ls. 10-25.¹) At that hearing he initially denied ever having told the police or "anybody in the jail about [his] conversations with Mr. Cook." (P.H. Tr., p. 92, Ls. 7-19.) Nelson then testified that Cook had admitted having sex with the victim but had stated that it was consensual. (P.H. Tr., p. 92, L. 16 – p. 93, L. 9; p. 96, Ls. 3-14.) He later admitted stating to a police officer that Cook had told him that he had forced the victim to have sex. (P.H. Tr., p. 93, L. 13 – p. 94, L. 17.)

Prior to the start of presentation of evidence at trial, the district court in the criminal case took up questions about the admissibility of certain evidence. (Trial Tr., p. 107, Ls. 9-17.²) One of those questions addressed "alleged evidence that the Defendant had threatened to harm witness Paul Nelson's family." (Trial Tr., p. 108, Ls. 4-7.) Cook's counsel did not object to the admission of Nelson's

¹ The district court took judicial notice of the preliminary hearing transcript from the underlying criminal trial as part of evidence it received. (R., p. 380.) All citations to the "P.H. Tr." are to the transcript of the preliminary hearing in docket no. 36145.

² The district court received the transcript of the criminal trial as an exhibit. (Tr., p. 4, L. 24 – p. 5, L. 13.) The state's citation to the "Trial Tr." is to the trial transcript in docket no. 36145.

testimony regarding the alleged threats because it was “part and parcel of Mr. Nelson’s testimony or contention,” which he concluded was “not true.” (Trial Tr., p. 108, Ls. 8-16.)

At the trial, Nelson testified that Cook had initially told him the sex with the victim was consensual, but that he later twice stated that he had stalked her to her hotel prior to the rape, had pushed a door in, and had pinned her to the bed with an elbow and raped her. (Trial Tr., p. 371, L. 21 – p. 378, L. 25.) Nelson testified that just prior to Cook’s preliminary hearing, Cook confronted him about being a witness and “started making threats and stuff ... that something would happen to [Nelson’s] daughter” and wife. (Trial Tr., p. 381, L. 4 – p. 383, L. 1.) Because of the threat Nelson was “worried about [his] family” and therefore at the preliminary hearing only testified about Cook’s first statement, that the sex had been consensual. (Trial Tr., p. 383, Ls. 2-25.)

In his post-conviction petition Cook alleged that counsel was ineffective for not objecting to Nelson’s testimony that Cook threatened his family just prior to him testifying at Cook’s preliminary hearing. (R., p. 14.) The district court stated “the question in this case is whether the potential of the jury’s emotional response to the evidence that Cook threatened to rape and murder Nelson’s family would have caused the jury to decide Cook’s case without regard to the evidence’s probative value.” (R., p. 396.³) The trial court concluded that “a

³ The evidence does not support the district court’s conclusion that Nelson testified that Cook threatened to rape his wife and daughter. Nelson testified Cook said “something would happen” to Nelson’s daughter, that his girlfriend would “follow” Nelson’s wife, and the wife “would be done just the same” as the victim. (Trial Tr., p. 381, L. 20 – p. 382, L. 15.) Although the threat that the wife

motion to suppress [sic] Nelson's testimony that Cook threatened to rape his wife and daughter likely would have been granted" and that there was "simply no strategic reason to allow highly prejudicial evidence to be admitted if it could be excluded." (R., p. 396.) The court also concluded there was prejudice because "the jury could not have ignored the inflammatory nature of the threat in determining Cook's guilt." (R., p. 400.)

The district court's analysis is flawed because, although it at one point articulates the legal standards for ineffective assistance of counsel, it does not actually apply them to the facts of this case, instead concluding that finding the evidence inadmissible is enough to find deficient performance. The district court failed to even address counsel's stated reason for not objecting (that the threat was "part and parcel" of Nelson's contention). Application of the correct legal standards to the facts of this case shows that counsel was not ineffective because the decision to not object was reasonable under the circumstances.

B. Standard of Review

When reviewing the district court's decision on a post-conviction case after a hearing, the appellate court "will not disturb the lower court's factual findings unless they are clearly erroneous" but will "exercise free review of the district

"would be done just the same" as the victim might, in some circumstances, be interpreted as a rape threat, it is unlikely that Cook was threatening that his girlfriend would rape the victim. It is more likely that the threat that Nelson's wife would be "done just the same" as the victim was a threat to kill the wife, because Nelson had also threatened to kill the victim. (See Trial Tr., p. 366, Ls. 4-19). Thus, there was a threat to "murder" the wife and daughter, but no threat to "rape."

court's application of the relevant law to the facts." Cooke v. State, 149 Idaho 233, 244, 233 P.3d 164, 175 (Ct. App. 2010) (citing Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004)).

C. The District Court Found No Objective Deficiency By Counsel, A Necessary Prerequisite To Its Determination That Counsel's Performance Was Deficient, And Therefore Erred In Granting Relief

Application of the law to the facts of this case shows the district court erred. It is well established that the "lack of objection to testimony fall[s] within the area of tactical, or strategic, decisions." Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). "When evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008).

In State v. Dunlap, 155 Idaho 345, ___, 313 P.3d 1, 40 (2013), the post-conviction petitioner alleged counsel was ineffective in failing to object to reports by doctors admitted at capital sentencing because admission of those reports allegedly violated the petitioner's Fifth Amendment and confrontation rights. The Idaho Supreme Court did not address the merits of such an objection at all;

rather, it held that “[i]n the absence of evidence suggesting that the introduction [of the allegedly excludable evidence] was the product of inadequate preparation or ignorance of the relevant law, we hold that the district court did not err by summarily dismissing this claim of ineffective assistance of counsel.” Id.

In Payne, 146 Idaho at 563, 199 P.3d at 138, the Court addressed a claim that trial counsel performed deficiently by not presenting an expert on the “fallibility of eyewitness identifications.” The Court stated, “the decision of what evidence should be introduced at trial is considered strategic or tactical.” Id. (quoting Bagshaw v. State, 142 Idaho 34, 38, 121 P.3d 965, 969 (Ct. App. 2005)). Because Payne “provided no evidence which suggests that this decision” regarding what evidence to present “resulted from inadequate preparation, ignorance or other shortcomings” the “presumption that counsel’s performance fell within the acceptable range of professional assistance” required the conclusion that there had been no deficient performance. Payne, 146 Idaho at 563, 199 P.3d at 138.

As in Dunlap and Payne, Cook presented no evidence suggesting trial counsel’s election to not object to the evidence of threats because it was “part and parcel” of the witness’s testimony was the product of inadequate preparation, ignorance of the relevant law, or any other objective shortcoming. Thus, Cook failed to present even a *prima facie* claim of deficient performance.

The district court stated the “question” before it was whether the evidence to which counsel elected not to object was prejudicial to Cook. (R., p. 396.) Answering that question in the affirmative, the district court concluded the

testimony regarding the threats was inadmissible. (Id.) Having concluded the evidence was inadmissible, the district court determined “there is simply no strategic reason” to not object. (Id.) However, the district court did not address, much less find, ignorance of the law, inadequate preparation, or any other objective shortcoming. The district court therefore applied an incorrect analysis and made no factual finding necessary to overcome the “presumption that counsel’s performance fell within the acceptable range of profession assistance.” Payne, 146 Idaho at 563, 199 P.3d at 138.

Moreover, the district court failed to even address defense counsel’s stated grounds for his non-objection. The district court stated the evidence was “arguably relevant” as evidence of consciousness of guilt. (R., p. 395.⁴) There is no evidence, however, that defense counsel declined to object on this basis. Rather, defense counsel declined to object because the evidence of the threats was “part and parcel of Mr. Nelson’s testimony or contention.” (Trial Tr., p. 108, Ls. 13-16.) In context, it is clear that the evidence of the threats was admitted at trial to explain why Nelson’s preliminary hearing testimony was markedly different from his trial testimony. (Trial Tr., p. 381, L. 4 – p. 385, L. 1.) The record thus

⁴ By finding the evidence only “arguably relevant” the district court also erred as a matter of law. “[A] defendant’s threats against a witness are admissible to show consciousness of guilt.” State v. Pokorney, 149 Idaho 459, 463, 235 P.3d 409, 413 (Ct. App. 2010) (quoting United States v. Begay, 567 F.3d 540, 552 (9th Cir. 2009)). Such evidence is also relevant to assessing the trial testimony of the threatened witness. Ebron v. United States, 838 A.2d 1140, 1152-53 (D.C., 2003). The evidence was relevant as a matter of law; not merely “arguably relevant” as the district court stated. The district court also cited no applicable law justifying its determination that a defendant can insulate himself from admission of this type of evidence by making a more violent threat, as opposed to a less violent one.

shows the evidence of threats was inextricably intertwined (“part and parcel”) with Nelson’s prior inconsistent testimony at the preliminary hearing. Defense counsel’s election to not object to admission of evidence of both the prior inconsistent testimony and the witness’s explanation for the inconsistency, on the basis that it tended to show that Nelson was not a reliable witness (Tr., p. 62, L. 8 – p. 63, L. 14), was a strategic decision, and there was neither evidence nor any finding of any objective shortcoming associated with that strategic decision.⁵

Trial counsel declined to object to testimony by Nelson that Cook had threatened him just prior to the preliminary hearing. Counsel stated the reason he declined to object was that he believed that this testimony was “part and parcel” of Nelson’s testimony, which included an admission of having testified inconsistently at the preliminary hearing. Cook provided no evidence of any objective shortcoming by counsel in electing to not object, and the district did not find any. Application of the law to the facts of this case shows that Cook did not prove any objective shortcoming of counsel, a prerequisite to any determination of deficient performance. By granting relief in the absence of any objective shortcoming by defense counsel, the district court erred.

⁵ As will be addressed more thoroughly in the next subsection addressing prejudice, defense counsel’s conclusion that admission of evidence of Nelson’s prior inconsistent testimony would likely lead to the admission of testimony of Cooks’ threats was an eminently reasonable one, and application of the correct legal standards shows the evidence was admissible.

D. The District Court Applied An Incorrect Prejudice And Evidentiary Standard And Therefore Erred In Its Prejudice Analysis

To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (quoting Strickland, 466 U.S. at 694)). As noted above, the district court failed to address defense counsel's stated grounds for not objecting to the evidence that Cook threatened Nelson. When those grounds are addressed, the record shows that Cook was not prejudiced because the evidence was admissible. Moreover, even if objectionable, failure to object did not establish a reasonable probability of a different outcome of the trial.

Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice—which is the tendency to suggest a decision on an improper basis—substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 907 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993).

Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence.

State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) ("Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant."). Rather, the rule protects only against evidence that is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908.

In this case the district court found the evidence of threats relevant only to show consciousness of guilt. (R., p. 395.) Relevance, however, is a question of law reviewed *de novo* by this Court. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). "It is settled that upon introduction of evidence which seemingly impeaches or contradicts a witness's testimony, the witness must be permitted a reasonable opportunity to explain the impeaching evidence." Openshaw v. Adams, 92 Idaho 488, 492, 445 P.2d 663, 667 (1968). Thus, Nelson's explanation that the inconsistent testimony he offered at the preliminary hearing was influenced by the threats was relevant as a matter of law once evidence of Nelson's prior inconsistent testimony was introduced at trial.

Because the evidence of threats was relevant as a matter of law to explain the prior inconsistent testimony, the proper weighing test should have been whether the probative value of the evidence *as an explanation for the prior*

inconsistent testimony was substantially outweighed by the potential for unfair prejudice. The district court, failing to recognize this relevance, never conducted the proper balancing test. Moreover, the question is not how the post-conviction judge would have exercised this discretionary decision, but whether the trial judge could have admitted the evidence without undermining confidence in the outcome of the trial. Because it would not have been reversible error for the trial judge to admit the evidence, Cook failed to prove any prejudice.

In the alternative, even if the evidence should have been objected to and excluded under the Rules of Evidence, its admission did not undermine confidence in the outcome of the trial. First, because the evidence of threats is extremely probative of the reason for the prior inconsistent testimony,⁶ it would have been unfairly prejudicial to admit evidence of the prior inconsistent testimony without evidence of the witness's explanation. Exclusion of the prior inconsistent testimony along with the evidence of the threats would have resulted in the loss of potential impeachment.

Second, the district court concluded that "the jury could not have ignored the inflammatory nature of the threat in determining Cook's guilt." (R., p. 400.) The prejudice standard is not whether the jury would have "ignored" the "inflammatory nature" of the evidence, but whether there is a reasonable likelihood they would have reached a different result, such that confidence in the verdict is undermined. If the jury found Nelson's testimony regarding the threats credible there is no reason (and no evidence suggesting) they would not have

found his testimony that Cook confessed incredible. Nor is there any reason they would have evaluated the other evidence of Cook's guilt differently. In short, applying the correct standard and looking at all the evidence presented at trial (instead of merely looking at the evidence the court found excludable), there is no basis for concluding Cook proved by a preponderance of evidence a substantial likelihood of a different result.

The district court applied an incorrect legal standard when it failed to recognize that the evidence of the threats was relevant as a matter of law to explain why Nelson provided prior inconsistent testimony at the preliminary hearing. It thereafter applied an incorrect weighing test, which failed to consider the relevance of the evidence for the purpose it was offered and admitted. It further erred by analyzing the evidentiary question *de novo* instead of determining whether the trial court would in fact have exercised its discretion in the same fashion. Finally, it utterly failed to consider the evidence actually presented at trial. The district court must be reversed because application of the correct legal standards shows that Cook failed to show prejudice arising from trial counsel's election to not object to testimony about Cook's threats against Nelson.

⁶ As noted above, FN 4, *supra*, the evidence was also extremely probative of consciousness of guilt, although it was not expressly admitted for that purpose.

II.

The District Court Applied An Incorrect Legal Analysis And Reached An Erroneous Conclusion Regarding Counsel's Tactical Decision In Relation To Evidence Of The Victim's Disclosure Of The Rape

A. Introduction

At trial the victim testified that immediately after the rape she called her friend, Hoss Dillon. (Trial Tr., p. 225, L. 4 – p. 229, L. 22.) Although she spent some time with Dillon and his brother Hank thereafter, she did not immediately disclose the rape, and in fact claimed nothing was wrong, despite Dillon's repeated inquiries into whether she was all right. (Trial Tr., p. 229, L. 23 – p. 245, L. 25.) She eventually, however, started crying and disclosed the rape, and Dillon called the police. (Trial Tr., p. 246, L. 1 – p. 248, L. 20.) On cross examination the victim admitted being "reluctant" to tell Dillon about the rape. (Trial Tr., p. 275, L. 15 – p. 276, L. 19.)

Hoss Dillon testified about being called by the victim, and that she sounded "upset." (Trial Tr., p. 289, L. 18 – p. 290, L. 24.) He went to where she was staying, and while together he repeatedly asked her what was wrong because she seemed upset. (Trial Tr., p. 290, L. 25 – p. 306, L. 22; p. 309, L. 9 – p. 311, L. 10.) She didn't say anything was wrong at first, but when asked the second or third time she disclosed that she had been raped. (Id.) On cross-examination trial counsel pointed out that Dillon had testified at the preliminary hearing that he had asked the victim what happened "six times," and only after being asked the sixth time did she say she had been sexually assaulted. (Trial Tr., p. 327, L. 5 – p. 328, L. 12.)

In closing argument trial counsel argued that the timing of the disclosure of rape by the victim to Dillon was inconsistent with her claim to have been raped and indicated she had fabricated the allegation. (Trial Tr., p. 522, Ls. 3-16; p. 524, Ls. 3-19; p. 537, L. 5 – p. 538, L. 15.)

Cook asserted in post-conviction that trial counsel was ineffective for not objecting to Hoss Dillon's testimony regarding the disclosure of the rape, asserting it was "inadmissible hearsay." (R., p. 11, ¶¶ 22-25.) The district court found deficient performance solely upon the conclusion that the testimony in question was "inadmissible hearsay and if an objection had been made to the testimony it likely would have been granted." (R., pp. 397-99.) The court found prejudice on the basis that the hearsay "provided the State an opportunity to repeat the victim's testimony." (R., p. 401.) Again, the district court has applied an incorrect legal standard to both prongs of the analysis. Application of the correct legal standard to the facts of the case shows neither deficient performance nor prejudice.

B. Standard of Review

When reviewing the district court's decision on a post-conviction case after a hearing, the appellate court "will not disturb the lower court's factual findings unless they are clearly erroneous" but will "exercise free review of the district court's application of the relevant law to the facts." Cooke v. State, 149 Idaho 233, 244, 233 P.3d 164, 175 (Ct. App. 2010) (citing Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004)).

C. The District Court Applied An Erroneous Legal Standard To Its Analysis Of Whether Trial Counsel's Performance Was Deficient

As stated above in more detail, the decision of whether to object to the admission of evidence is strategic, and therefore can be considered deficient performance only if made on the basis of ignorance of the law, inadequate preparation, or another shortcoming capable of objective review. State v. Dunlap, 155 Idaho 345, ___, 313 P.3d 1, 40 (2013); Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994). Again, the district court determined counsel's performance was deficient without finding the necessary factual predicate of ignorance, inadequate preparation, or other objective shortcoming. The district court effectively held that every potentially meritorious objection must be made, a standard incompatible with the applicable law.

Application of the correct legal standard requires Cook to overcome the presumption of competency by a preponderance of evidence showing counsel's tactical decision was based on ignorance of the law, inadequate preparation, or some other objective shortcoming. There is no evidence whatsoever of any objective shortcoming. Counsel very obviously in this record made the tactical decision to use evidence of the disclosure to argue that its timing called the victim's testimony into doubt. Applying the correct legal standards to this question shows that there was no deficient performance.

D. The District Court Applied An Erroneous Prejudice Standard

To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding

would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Application of this legal standard shows no prejudice.

The testimony Cook asserted his counsel should have objected to was as follows:

Q. What did she tell you when she got back up to the room?

A. She said that [Cook] had raped her, basically.

Q. Can you tell us in more detail what you recall her saying?

A. Um—she looked pretty upset. She said that—um—that he forced sex on her.

Q. Did she tell you—

A. She said that he grabbed her neck.

Q. Did she tell you anything else as far as physical contact?

A. Um—not that I recall, no.

(Trial Tr., p. 306, Ls. 1-12.) Thus, the entirety of the evidence at issue is Dillon's testimony that the victim said, after being repeatedly asked what was wrong and denying that something was wrong, that Cook "raped her," he "forced sex on her" and that he "grabbed her neck." This evidence did not meet Cook's burden of proving by a preponderance of evidence a reasonable probability of a different result had an objection been made.

The district court found prejudice because the evidence in question "provided the State an opportunity to repeat the victim's testimony." (R., p. 401.) What prejudice arises from such repetition is not obvious. Evidence of prior consistent statements is often admissible, presumably without any unfair

prejudice. See I.R.E. 801(d)(1). Even where evidence of prior consistent statements is erroneously admitted its only prejudice is to potentially bolster the credibility of the witness. State v. Jones, 125 Idaho 477, 488, 873 P.2d 122, 134 (1994) (finding erroneous admission of evidence of a prior consistent statement harmless beyond a reasonable doubt). On the other hand, evidence of prior statements by witnesses is often admitted by opposing parties on the basis that it will *impeach* the witness. See, e.g., I.R.E. 613. In this case trial counsel specifically used the evidence of the disclosure of the rape to Hoss Dillon to attack the credibility of the victim by arguing that the timing of the disclosure indicated that it was a fabrication. That this necessarily meant that certain limited parts of the victim's account of the rape were repeated did not prejudice Cook.

The other basis of the court's prejudice analysis was that it allowed the jury "to consider testimony from persons who had no first-hand knowledge of the factual issues in dispute at Cook's trial." (R., p. 401.⁷) The state is unaware of any legal authority supporting this analysis. The state readily admits that only two people had "first-hand knowledge" of the events constituting the rape—the victim and Cook. That Cook was unfairly prejudiced by all evidence other than the victim's testimony is a ludicrous proposition. There is no reason to believe that the jury was misled into believing Dillon had "first-hand knowledge" of

⁷ The district court also cited, but did not elaborate on, lack of cross-examination as a source of prejudice when hearsay is admitted. (R., p. 401 (citing Isaacson v. Obendorf, 99 Idaho 304, 309, 581 P.2d 350, 356 (1978).) Cook obviously had the opportunity to cross-examine the source of the statements, which was the victim, who also testified about her disclosure to Dillon. Thus, no conceivable prejudice arose from lack of cross-examination.


whether the rape occurred. His testimony regarding what he heard the victim say (and when) was limited to his “first-hand knowledge.” Dillon’s lack of “first-hand knowledge” of the rape itself was not in any cognizable way prejudicial to Cook, much less a basis for concluding that admission of his testimony that the victim disclosed the rape to him undermined confidence in the outcome of the trial.

The evidence in question—that after repeated inquiries the victim disclosed to Hoss Dillon that Cook “raped her,” “forced sex on her,” and “grabbed her neck”—was clearly admissible for the non-hearsay purposes of establishing when and what the victim disclosed about the events underlying the charge. Cook’s trial counsel used the evidence for the non-hearsay purpose of impeaching the victim. That the jury could theoretically have considered the evidence as substantive evidence of guilt was not prejudicial where the victim actually testified about the events and was cross-examined regarding those events. Admission of the very limited testimony in question, specifically used by counsel as a means of attacking the victim’s credibility, falls far short of undermining confidence in the verdict. Application of the law to the facts of this case shows the district court erred by finding prejudice.

CONCLUSION

The state respectfully requests this Court to reverse the district court's order and judgment granting post-conviction relief.

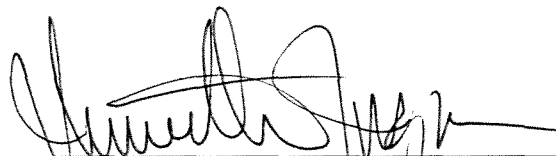
DATED this 17th day of January, 2014.


KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of January, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DANIEL G. COOPER
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KENNETH K. JORGENSEN
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KKJ/pm